



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DEC 10 2008

Elizabeth Kingsley, Esquire
Harmon, Curran, Spielberg & Eisenberg
1726 M Street, N.W.
Suite 600
Washington, D.C. 20036

RE: MUR 5970
Communities Voting Together

Dear Ms. Kingsley:

On April 30, 2008, the Federal Election Commission notified your client, Communities Voting Together ("CVT"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). On October 22, 2008, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe CVT violated 2 U.S.C. § 441a(a)(1). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Elena Paoli, the attorney assigned to this matter at (202) 694-1548.

Sincerely,

A handwritten signature in black ink that reads "Julie K. McConnell".

Julie K. McConnell
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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2 **FEDERAL ELECTION COMMISSION**

3 **FACTUAL AND LEGAL ANALYSIS**
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5 **RESPONDENTS:** Communities Voting Together

MUR: 5970

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8 **I. INTRODUCTION**

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10 This matter was generated by a complaint filed with the Federal Election Commission by
11 Lori Sherwood. See 2 U.S.C. § 437g(a)(1).

12 **II. FACTUAL AND LEGAL ANALYSIS**

13 Communities Voting Together ("CVT") is a public advocacy, unincorporated association.
14 The complaint alleges that CVT disseminated a mailer, which constitutes an excessive and
15 unreported contribution to Donna Edwards for Congress ("Committee"). The complaint further
16 alleges that CVT hired canvassers to assist the Edwards campaign.

17 CVT states that it disseminated issue advocacy leaflets in 2006 and 2008 that referred to
18 Edwards' opponent in the 2006 and 2008 primaries, Albert Wynn. CVT did not discuss the
19 leaflets with the Edwards campaign. The Executive Vice President of CSI, who was responsible
20 for the 2006 and 2008 projects, attests that he did not discuss the projects with other CSI
21 employees except as necessary to implement them, and he had no information regarding needs,
22 plans, projects, or activities of the Edwards campaign. CVT further states that it hired CSI, a
23 common vendor with the Committee, to create and disseminate CVT issue advocacy leaflets, but
24 not to "assist the Edwards campaign." The leaflets were mailed in 2006 and mailed and hand-
25 delivered in 2008.

1 The Act, as amended by BCRA, provides that no person shall make contributions to any
2 candidate and his or her authorized political committee with respect to any election for federal
3 office, which, in the aggregate, exceed \$2,300. 2 U.S.C. § 441a(a)(1)(A).

4 Under the Act and Commission regulations, the terms “contribution” and “expenditure”
5 include any gift of money or “anything of value” made by any person for the purpose of
6 influencing a Federal election. *See* 2 U.S.C. § 431(8)(A)(i) and (9)(A)(i); 11 C.F.R. §§
7 100.52(a) and 100.111(a). The phrase “anything of value” includes all in-kind contributions. *See*
8 11 C.F.R. §§ 100.52(d)(1) and 100.111(e)(1). In-kind contributions include expenditures made
9 by any person “in cooperation, consultation, or concert, with, or at the request or suggestion of” a
10 candidate, a candidate’s authorized committees, or their agents. 2 U.S.C. § 441a(a)(7)(B)(i).

11 Commission regulations specify a three-prong test to determine whether a payment for a
12 communication becomes an in-kind contribution as a result of coordination between the person
13 making the payment and a candidate. *See* 11 C.F.R. § 109.21(a)(1)–(3). Under the first prong of
14 the coordinated communication test, the communication must be paid for by a person other than
15 a candidate, a candidate’s authorized committee, a political party committee, or agents of any of
16 the foregoing. *See* 11 C.F.R. § 109.21(a)(1). Under the second prong, the communication must
17 satisfy one of the four content standards set forth in 11 C.F.R. § 109.21(c).¹ Under the third

¹ After the decision in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (Court of Appeals affirmed the District Court’s invalidation of the fourth, or “public communication,” content standard of the coordinated communications regulation), the Commission made revisions to 11 C.F.R. § 109.21 that became effective July 10, 2006. In a subsequent challenge by Shays, the U.S. District Court for the District of Columbia held that the Commission’s content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not vacate the regulations or enjoin the Commission from enforcing them. *See Shays v. FEC*, 508 F.Supp.2d 10, 70-71 (D.D.C. Sept. 12, 2007) (NO. CIV.A. 06-1247 (CKK)) (granting in part and denying part the respective parties’ motions for summary judgment). Recently, the D.C. Circuit affirmed the district court with respect to, *inter alia*, the content standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. *See Shays v. FEC*, ___ F.3d ___, (D.C. Cir. 2008).

1 prong, the communication must satisfy one of the five conduct standards set forth in 11 C.F.R.

2 § 109.21(d).²

3 CVT's response, including affidavits, sufficiently rebuts the complaint's vague
4 allegations that CVT and the Committee coordinated the CVT leaflets. The response specifically
5 rebuts allegations that CVT and the Committee engaged in conduct that would meet the
6 requirements of 11 C.F.R. § 109.21(d). Furthermore, the 2006 leaflet, and purportedly similar
7 2008 leaflet, are issue focused and ask the reader to call Albert Wynn to explain his energy
8 policies. Therefore, there is no reason to believe that CVT violated 2 U.S.C. § 441a(a)(1) by
9 making an excessive in-kind contribution in the form of a coordinated communication.

² The conduct prong is satisfied where any of the following types of conduct occurs: (1) the communication was created, produced or distributed at the request or suggestion of a candidate or his campaign; (2) the candidate or his campaign was materially involved in decisions regarding the communication; (3) the communication was created, produced, or distributed after substantial discussions with the campaign or its agents; (4) the parties contracted with or employed a common vendor that used or conveyed material information about the campaign's plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; (5) the payor employed a former employee or independent contractor of the candidate who used or conveyed material information about the campaign's plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; or (6) the payor republished campaign material. See 11 C.F.R. § 109.21(d).